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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1949**

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# No. 496

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JAMES MATTHEWS, JOHN HENRY NICHOLS AND JOHN HENRY RADNEY,

*Petitioners,*

*v.*

THE UNITED STATES OF AMERICA,

*Respondent*

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF.**

---

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*Of Counsel.*

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# No. 496

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JAMES MATTHEWS, JOHN HENRY NICHOLS AND JOHN HENRY RADNEY,

*Petitioners,*

*v.*

THE UNITED STATES OF AMERICA,

*Respondent*

---

## PETITION FOR WRIT OF CERTIORARI

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*To the Honorable the Supreme Court of the United States:*

Your petitioners, James Matthews, John Henry Nichols and John Henry Radney, respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit rendered in the case of James Matthews, John Henry Nichols, John Henry Radney and Will S. Stewart versus United States of America on October 28, 1949, affirming the conviction of petitioners, James Matthews, John Henry Nichols and John Henry Radney, in the District Court of the United States for the Middle District of Georgia. Your said petitioners filed in due season in the United States Circuit Court of Appeals for the Fifth Circuit a petition for re-

hearing in said case, which petition was considered by the said court of appeals and denied by said court of appeals on November 25, 1949 (R. 113, 116, 121).

## I

### The Case

The three petitioners, James Matthews, John Henry Nichols and John Henry Radney, together with a fourth person, Will S. Stewart, were tried together in the District Court of the United States for the Middle District of Georgia upon an indictment in four counts charging, first, that they had in their possession and custody and under their control a still and distilling apparatus; and second, that they carried on the business of distillers without having given bond; and third, that they carried on the business of distillers with intent to defraud; and fourth, that they worked in a distillery. They were convicted upon all counts and sentenced as follows: James Matthews, to imprisonment for three years and a fine of $300.00; John Henry Nichols to imprisonment for two years and a fine of $300.00; John Henry Radney to imprisonment for a year and a day and a fine of $300.00 and Will S. Stewart te imprisonment for a year and a day and a fine of $300.00 (R. 2, 3, 78-85). In the Court of Appeals for the Fifth Circuit, the conviction of Will S. Stewart was reversed but the conviction of the three petitioners herein was affirmed.

Prior to arraignment and entering pleas of not guilty, the four defendants filed their written motion for a bill of particulars (R. 4, 5), asking for specific information as to the time and place of the commission of the alleged offenses, and asking also for information as to "Exactly what acts and what particular work it is alleged that each of the said four defendants did which allegedly constituted working in

a distillery." Government counsel supplied the information requested as to time and place, but as to the information and particulars sought by the above quoted request, the trial court ruled "I think that would be a matter of evidence" (R. 10) and denied the motion and request for a bill of particulars with respect to what acts and what particular work each defendant allegedly did. The verified motion for a bill of particulars alleged that the four defendants were unable to prepare for trial without the information requested (R. 5).

Also, prior to the trial, the petitioner, James Matthews, through his counsel, advised the court that some ten or eleven years before this alleged offense, he had been convicted of a whiskey offense and was apprehensive that government counsel might seek to inject that conviction into the instant case, and moved the court to exclude from the instant case any and all references to said prior conviction, and not to permit government counsel to refer to it in the presence of the jury. This motion of counsel for James Matthews was based upon remoteness in point of time of said prior offense and conviction from the date of the alleged offense in this case (R. 11). The court overruled the motion and ruled "If the defendant takes the stand as a witness, and if for the purpose of impeachment, the government tenders evidence of a prior conviction of a felony, then I would admit that evidence for impeachment purposes" (R. 12).

Later, upon the trial, the court permitted government counsel to interrogate Petitioner Matthews, over the latter's objection, about his conviction on a charge of violating the whiskey laws in December 1938.

At the beginning of the trial, the court inquired whether either side desired the rule invoked as to sequestering the witnesses, and counsel for defendants replied in the affirm-

ative. Government counsel then requested permission for Mr. Cone, the investigator, to remain in the courtroom. That permission was granted over the objection of petitioners (R. 13). This witness, Mr. Cone, sat with government counsel throughout the trial, testified as the government's first witness (R. 14), was recalled by the government for additional testimony just prior to resting the government's case (R. 43) and was recalled again by the government in rebuttal (R. 61).

Both at the conclusion of the government's case and at the conclusion of all of the evidence, each of the defendants made a motion for a directed verdict of not guilty and for judgment of acquittal, which motions were overruled and exceptions noted and allowed (R. 41, 61 and 71).

Petitioners' first witness was Petitioner James Matthews. The cross-examination of this witness by government counsel began as follows: (R. 48)

"Q. James, do you remember me?

A. I don't know, sir.

Q. Don't you remember me from the last time you were in Court here, back on December 13th and 14th, 1938? Do you remember that?

A. No, sir, I remember something about it somewhere but I don't remember it.

Q. You knew Mr. T. D. Wilson at that time, didn't you?

A. T. D. Wilson?

Q. Yes.

A. Yes, sir.

Q. And J. D. Hamil?

A. Yes, sir.

Q. Did you know him?

A. Yes, sir.

Mr. Bootle:

Your Honor please, I object to this line of questioning as being improper. If he wants to impeach the witness, that is not the proper way to do it.

Mr. Watkins:

I am asking him if he remembers me. I tried him here eleven years ago.

Mr. Bootle:

I take it that it is utterly immaterial whether he remembers my distinguished friend or not.

The Court:

Well, let's get along with the case.

Mr. Bootle:

Well, that's my objection. I object to that line of questioning, because it is improper. It is not the way to impeach a witness, even if he has any grounds upon which to impeach the witness.

Mr. Watkins:

He said he didn't remember seeing anybody there at this still. The mash was hot and ready to go and that wasn't but just last August. Now, if he doesn't remember anything about that, I want to see what kind of memory this man has got.

The Court:

Well, you have got a right to test his memory.

Mr. Watkins:

And I want to also offer evidence to impeach him.

The Court:

All right, go ahead now.

Mr. Bootle:

Well, I move to rule out those preliminary questions about whether he distinctly remembers my distinguished friend. I don't think it has a thing in the world to do with this case.

The Court:

Well, I will overrule that objection.

(Mr. Watkins):

Q. I will ask you to state, James, if you were not convicted in this Court on a charge of violating the liquor laws on December 14, 1938?

Mr. Bootle:

Now, for the purpose of the record, may I interpose our objection to any conviction, for violating the liquor laws ten or eleven years ago, upon the ground of its remoteness; and we respectfully submit that it is inadmissible, because it is so far removed in point of time that it throws no material or substantial light upon the credibility of a witness eleven years later or ten years later.

The Court:

Well, that would be a question for the jury to determine. I overrule the objection.

Mr. Bootle:

And, for the purpose of the record, may I add, that I respectfully submit that the purpose of that is to put the defendant's character in issue.

The Court:

I understand that the District Attorney is offering it on the question of impeachment.

Mr. Watkins:

Yes, sir.

The Court:

And it is submitted for that purpose and that purpose alone.

Mr. Watkins:

That is the only reason we are offering it.

The Court:

I instruct the jury that that evidence is admissible on the question of impeachment, and upon that question alone. I don't know, did the witness answer? You ask the question.

(Mr. Watkins):

Q. Do you remember that the jury in this Court convicted you of the offense of conspiracy to violate the liquor laws, the revenue liquor laws of the United States, in December of 1938, right here in this Courtroom?

A. Yes, sir, I remember it.

Q. You remember that?

A. Yes, sir.

Q. That you were convicted?

A. Yes, sir.

Q. And you served a sentence for that offense?

A. That's right."

The evidence relied upon by the government as being sufficient to support the conviction of the three petitioners is as follows:

Two State Revenue Agents, James Robinson and Howard Smith, located an illicit distillery in Butts County, Georgia, on August 25, 1948 (R. 32). It consisted of fifteen 220 gallon wood fermenters filled with

beer mash fit for distillation, two 220 gallon wood stills, two 220 gallon doubler barrels, a 50 gallon drum of oil, a pressure tank, an oil burner and about 10 cases, each containing four one gallon jugs (R. 16, 17). These officers visited it on August 26, 1948, and thought it would be ready for operation on the next day. They called Investigator T. U. Cone to help them and on the 27th they went to raid the still (R. 33). They stationed themselves some 100 yards from the still and about 4:15 or 4:30 the next morning an old 1934 model Ford truck (R. 34) was driven by two men (R. 18) to a point 30 or 40 paces from the still (R. 18, 24). The officers could not see and did not know who the two men were (R. 18, 24). Two men left the parked truck and walked on down the still path (R. 18) and in a few minutes the oil burner at the still was lighted (R. 18). The officers did not know who fired the distillery (R. 36). Officer Robinson "crawled out there and examined the truck" (R. 34). On the truck were 90 cases of one gallon jugs, 4 jugs to the case, and 4 drums of oil, each drum containing about 50 gallons (R. 21). While Officer Robinson was at the truck, Petitioners, John Henry Nichols (white) and John Henry Radney (colored), came up to the truck from the direction of the still and were arrested (R. 18, 34), Nichols by Officer Robinson, after walking right into Robinson's hands (R. 34), it being very dark (R. 23), and Radney, after a short chase, by a man named Brooks, who did not testify (R. 34). Officers Robinson and Brooks then took Nichols and Radney down to the still.

It was so dark "you would have to be pretty much on top of" a man before you could recognize him (R. 23). "It was very dark down there."

Investigator Cone stayed up at the truck and was there when Petitioner James Matthews and Will S. Stewart walked up to the truck in the darkness (R. 19-20) (Stewart's conviction was reversed by the Court of Appeals). Officer Cone testified that they were together (R. 20). Each of them testified that they were not together (R. 45, 67, 70).

Will S. Stewart had a box of groceries; James Matthews had nothing (R. 20). Officer Cone testified that as James Matthews neared the truck he remarked: "Well, I see this old piece of truck finally did get here all right" (R. 20). Matthews testified that what he said was: "I wonder what they got this old junk in here for" (R. 44, 45). Officer Cone testified that James Matthews walked on down to the still and put his hand in the beer, stirred it around, took a sip of it and said: "It's dead ready," "How many more are ready to go"? (R. 20). Officer Cone testified also that Matthews, upon seeing him at the still, said "Well, I guess we're caught all right" and "couldn't a darn one of you fellows get away"? and also that Matthews asked him if it would be all right for him Matthews, to get someone to make bond for the other defendants (R. 20) and that later he did make bond for all of them (R. 21). Officer Robinson testified that James Matthews told the negroes, Radney and Stewart, to help the officers destroy the distillery (R. 36).

Matthews denied putting his hand in the beer (R. 46) and testified that the officers asked him "How come them negroes can't help tear it up?" and that he replied: "I haven't got anything to do with those negroes (Radney and Stewart) and that when he got ready to go, Nichols asked him about making bond for him (R. 47). Matthews denied having any connection with the distillery and testified that he went to the distillery to buy some liquor (R. 44). He parked his new Chevrolet half ton truck (R. 27) between a quarter and a half a mile from where the old Ford truck was (R. 27), and walked down to the distillery (R. 44).

Stewart (whose conviction was reversed by the Court of Appeals) testified that a white man whom he did not know employed him to deliver the groceries to a person who would meet him (R. 66) and that Mr. Matthews did not come to the distillery with him (R. 67) although Investi-

gator Cone, when recalled to the stand for the second time, testified that Stewart told him that Matthews picked him (Stewart) up about two miles from the still on the highway and brought him on down (R. 65). Stewart testified that he did not see Mr. Matthews until he (Stewart) had been arrested and was forced to the still (R. 67).

Neither Nichols nor Radney testified.

## II

### Questions Presented

1. Whether the trial court erred in denying to petitioners a bill of particulars (R. 4-10).

2. Whether the trial court erred in permitting the Government's chief witness to remain in the courtroom throughout the trial (R. 13, 14).

3. Whether the trial court erred in overruling motions for directed verdicts of not guilty and for judgments of acquittal made at the conclusion of the Government's evidence and at the conclusion of all of the evidence (R. 41, 61, 71).

4. Whether the trial court erred in permitting the Government to introduce evidence of the prior conviction of Petitioner Matthews upon a whiskey offense which occurred more than ten years prior to this alleged offense (R. 11, 12, 13, 50).

5. Whether the trial court erred in permitting Government counsel to cross-examine Petitioner Matthews in the manner herein above indicated and in overruling the objections of Matthews' counsel to such question, and in overruling the motion of Matthews' counsel to exclude such questioning and the replies thereto from the record.

6. Whether petitioners are entitled to an adjudication upon questions 1, 2, 4 and 5 *supra*, the Court of Appeals having ruled it "unnecessary—to pass upon" them.

## III

### Assignments of Error

1. The United States Circuit Court of Appeals for the Fifth Circuit erred in deciding "We consider it unnecessary to restate the evidence at length, or to pass upon the numerous specifications of error assigned" (R. 114).

2. The United States Circuit Court of Appeals for the Fifth Circuit erred in deciding "There is abundant evidence in the record which points unerringly to the guilt of each of the Appellants except Will Stewart" (R. 114).

3. The United States Circuit Court of Appeals for the Fifth Circuit erred in its holding as follows: "The conviction of Appellants Matthews, Nichols and Radney is affirmed" (R. 114).

## IV

### Reasons Relied On for the Allowance of the Writ

1. The United States Circuit Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter.

With respect to the denial of Petitioners' application for a bill of particulars, the conflicting decisions of other Circuit Courts of Appeals are as follows:

*Singer* v. *United States*, 58 Fed. (2d) 74 (3 C.C.A.);
*Peck* v. *United States*, 65 Fed. (2d) 59 (7 C.C.A.);
*Billingsley, et al* v. *United States*, 16 Fed. (2d) 754 (8 C.C.A.).

With respect to the sufficiency of the evidence to sustain the conviction of the three petitioners, the conflicting decisions of other Circuit Courts of Appeals are as follows:

*Girgenti* v. *United States*, 81 Fed. (2d) 741 (3 C.C.A.);
*Graceffo* v. *United States*, 46 Fed. (2d) 852-853 (3 C.C.A.);
*United States* v. *DeVito*, 68 Fed. (2d) 837 (2 C.C.A.);
*Partson* v. *United States*, 20 Fed. (2d) 127 (8 C.C.A.).

2. In holding that it was unnecessary to pass upon the following specifications of error assigned:

"(4) In permitting the Government to introduce evidence of his prior conviction of a whiskey offense which occurred more than ten years prior to the trial of this case (R. 11, 12, 13, 50).

"(5) In permitting the Assistant United States Attorney to undertake to impeach him by virtue of said prior conviction without either producing the record of said prior conviction or merely asking the witness whether he had been convicted, and in permitting the Assistant United States Attorney to dramatize said former conviction in the manner shown on pages 48, 49, 50 and 51 of the record, and in refusing to rule out and exclude from the evidence the question propounded by the Assistant United States Attorney to James Matthews: 'do you remember me?' and the answer thereto, and those preliminary questions about whether Matthews remembered the Assistant United States Attorney (R. 48, 49, 50, 51), those preliminary questions being: 'Q. James, do you remember me?' A. I don't know sir. Q. Don't you remember me from the last time you were in court here, back on December 13th and 14th, 1938? Do you remember that? A. No, sir, I remember something about it somewhere but I don't remember it. Q. You knew Mr. T. D. Wilson at that time, didn't you? A. T. D. Wilson? Q. Yes. A. Yes, sir. Q. And J. D. Hamil? A. Yes, sir. Q. Did you know him? A. Yes, sir" (R. 48).

the United States Circuit Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the trial court as to call for an exercise of this Court's power of supervision and to require a reversal of those portions of the holding of the United States Circuit Court of Appeals for the Fifth Circuit herein objected to and assigned as error.

WHEREFORE, Your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 12,817, *James Matthews, John Henry Nichols, John Henry Radney and Will S. Stewart, Appellants,* v. *United States of America, Appellee,* and that the said judgment of the United States Circuit Court of Appeals for the Fifth Circuit be reversed by this Honorable Court; and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioners will ever pray.

W. A. BOOTLE,
*Attorney for Petitioners,*
J. J. FLYNT, JR.,
*Of Counsel.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1949**

# No. 496

JAMES MATTHEWS, JOHN HENRY NICHOLS, JOHN HENRY RADNEY,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA

*Respondent*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### I

### The Opinion of the Court Below

The opinion in the United States Court of Appeals for the Fifth Circuit was rendered October 28, 1949, and is reported in 177 Fed. 2(d) 278.

### II

### Jurisdiction

1

The date of the judgment to be reviewed is October 28, 1949. Thereafter and within the time allowed by law and by the rules of the United States Court of Appeals for the Fifth Circuit and on November 17, 1949, these petitioners

filed a petition for rehearing, which petition was entertained and considered by said United States Court of Appeals for the Fifth Circuit and by said Court of Appeals denied on November 25, 1949 (R. 116, 121).

2

In affirming the conviction of these three petitioners, the United States Court of Appeals for the Fifth Circuit approved the trial Court's denial of petitioners' motion for a bill of particulars and thereby rendered a decision in conflict with the following decisions of other Circuit Courts of Appeal, including the following decisions:

*Singer* v. *United States*, 58 Fed. 2(d) 74 (3 C.C.A.);
*Peck* v. *United States*, 65 Fed. 2(d) 59 (7 C.C.A.);
*Billingsley et al.* v. *United States*, 16 Fed. 2(d) 754 (8 C.C.A.).

In affirming the conviction of these three petitioners, the United States Court of Appeals for the Fifth Circuit approved the rulings of the trial Court denying Petitioners' motions for directed verdicts of not guilty and for judgments of acquittal and thereby rendered a decision in conflict with the decisions of other Circuits, which latter decisions clearly hold that the evidence in this case would not be sufficient to authorize a conviction of these petitioners. We respectfully refer to the following decisions of other Circuits:

*Girgenti* v. *United States*, 81 Fed. 2(d) 741 (3 C.C.A.);
*Graceffo* v. *United States*, 46 Fed. 2(d) 852 (3 C.C.A.);
*United States* v. *DeVito*, 68 Fed. 2(d) 837 (2 C.C.A.);
*Partson* v. *United States*, 20 Fed. 2(d) 127 (8 C.C.A.).

In affirming the conviction of Petitioner Matthews, the United States Court of Appeals for the Fifth Circuit ap-

proved the rulings of the trial Court permitting Government counsel to undertake to impeach Petitioner Matthews when he appeared as a witness for himself by interrogating him as to a prior conviction of a whiskey offense more than ten years old and without either producing the record of said prior conviction or interrogating Petitioner Matthews in the conventional manner by asking him whether or not he had ever been convicted of such offense. The manner of questioning complained of is fully set out in our statement of the case in the petition for certiorari and, for the sake of brevity, will not be repeated in full at this point. The vice inherent in the manner of questioning consists in the fact that the questioning began with the question: "Do you remember me?" and proceeded as follows. Petitioner Matthews obviously did not remember Government Counsel and so testified. Then the next question propounded to Petitioner Matthews was: "Don't you remember me from the *last* time you were in court here, back on December 13 and 14, 1938? Do you remember that?" (Italics supplied.) Petitioner Matthews still did not remember Government Counsel and so testified and then upon a proper objection interposed by Matthews' counsel, as follows: "Your Honor please, I object to this line of questioning as being improper. If he wants to impeach the witness, that is not the proper way to do it." Government Counsel stated in the presence of the jury: "I am asking him if he remembers me. *I tried him here eleven years ago.*" (Italics supplied.)

In approving that type of cross examination, the trial Court and the United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure as to call for an exercise of this Court's power of supervision.

In the United States Court of Appeals for the Fifth Circuit, these petitioners assigned the following specifications of errors:

(a) Denial of requested bill of particulars.

(b) The permitting of the Government's chief witness to remain in court throughout the trial.

(c) The overruling of motions for directed verdicts of not guilty and for judgments of acquittal.

(d) Permitting the Government to introduce evidence of a prior whiskey conviction more than ten years old.

(e) Permitting the manner of cross examination above specified (R. 105).

With respect to said specification of errors relied upon, the United States Court of Appeals for the Fifth Circuit held as follows:

> "We consider it unnecessary to restate the evidence at length or to pass upon the numerous specifications of error assigned. There is abundant evidence in the record which points unerringly to guilt of each of the appellants except Will Stewart" (R. 114).

It appears, therefore, that the United States Court of Appeals for the Fifth Circuit held that it was unnecessary to pass upon the numerous specifications of error assigned and did not pass upon any of them except the specification dealing with the insufficiency of the evidence. We respectfully contend that such holding of the United States Court of Appeals for the Fifth Circuit was erroneous for that if these specifications of error not passed upon or any one of them is meritorious and well taken, these petitioners would necessarily be entitled to a new trial. We respectfully submit, therefore, that the United States Court of

Appeals for the Fifth Circuit in deciding that it was not necessary to pass upon these specifications of error assigned has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The said specifications of error were properly made, strenuously urged and should be passed upon.

3

The jurisdiction of this Court is invoked under Section 347 of Title 28 of the United States Code Annotated (Judicial Code Section 240, Amended) and in accordance with the rules of the Supreme Court and particularly Rule 38.

4

Cases, among others, relied upon as sustaining the jurisdiction of this Court are the following:

*Magnum Import Co.* v. *Coty,* 262 U. S. 159-163; 67 L. Ed. 922;

*Hamilton Shoe Co.* v. *Wolf Bros.,* 240 U. S. 251-258.

## III

## Statement of the Case

It is believed that the statement of the case contained under heading "I, The Case" in the petition for certiorari is adequate and, for the sake of brevity, we shall not repeat the statement of the case at this point.

## IV

## Specifications of Error

1

The United States Circuit Court of Appeals for the Fifth Circuit erred in finding and holding that

> "We consider it unnecessary—to pass upon the numerous specifications of error assigned" (R. 114).

In this connection, the Court of Appeals should have passed upon all of the following specifications of error properly made and strenuously urged:

(a) The denial to petitioners of a bill of particulars.

(b) The refusal of the Court to segregate the Government witnesses insofar as Investigator T. U. Cone is concerned.

(c) Permitting the Government to prove a prior conviction ten years old in the absence of any evidence of misconduct in the interim.

(d) Permitting Government counsel to cross examine petitioner Matthews in the manner complained of (R. 105-107).

The Court of Appeals did not pass upon those specifications and decided that it was unnecessary to do so.

2

The Court of Appeals erred in finding and holding that

> "There is abundant evidence in the record which points unerringly to the guilt of each of the appellants except Will Stewart" (R. 115).

3

The Court of Appeals erred in finding and holding that

> "The conviction of Appellants Matthews, Nichols and Radney is affirmed" (R. 114).

## V

## ARGUMENT

**The Court of Appeals erred in deciding that it was not necessary to pass upon the following four specifications of error and should have passed upon them and should have decided all of said specifications in petitioners' favor and should have reversed the conviction of petitioners and ordered a new trial, said specifications of error being as follows:**

1

The trial Court erred in not ordering Government Counsel to furnish petitioners with a bill of particulars.

2

The trial Court erred in permitting the Government's chief witness, Investigator Cone, to remain in court throughout the trial.

3

The trial Court erred in permitting the Government to offer evidence as to a prior conviction of a whiskey offense more than ten years old in the absence of any evidence of misconduct in the interim.

4

The trial Court erred in permitting Government Counsel to question Petitioner Matthews in the manner hereinabove mentioned.

We respectfully submit that the said assignments of error having been properly made and strenuously urged should have been passed upon by the Circuit Court of Appeals and that petitioners are entitled to an adjudication upon said specifications of error. This is particularly true in view of the fact that if any one of said specifica-

tions of error is meritorious, a new trial would have to be ordered.

We respectfully submit further that each of said specifications of error is meritorious and should have been decided in petitioners' favor. We shall discuss them briefly seriatim.

(1) Petitioners were entitled to a bill of particulars disclosing "exactly what acts and what particular work each of said four (three) defendants did which allegedly constituted working in a distillery".

Rule 7(f) of Federal Rules of Criminal Procedure provides as follows:

> "The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires."
>
> 18 U.S.C.A. 687.

> "The rule that the granting of the motion rests in the discretion of the court is too well settled to require a citation of more than a few of the many decisions so holding. This discretion is sometimes said to be not reviewable, *but the true rule seems to be that it is not reviewable except in case of abuse of discretion.*" (emphasis supplied).
>
> Cyclopedia of Federal Procedure, 2nd Edition, Sec. 4160.

Petitioners' motion for a bill of particulars was *timely*, having been made prior to arraignment and prior to pleas of not guilty (R. 6-10).

While it is sometimes said that the granting of a motion for a bill of particulars rests in the discretion of the Court,

"the true rule seems to be that it (the denial of such motion) is not reviewable except in case of abuse of discretion." Cyclopedia of Federal Procedure, 2nd Edition, Sec. 4160.

In the following cases, it was held an abuse of discretion to deny applications for a bill of particulars:

*Singer* v. *United States*, 58 F. 2(d) 74, 3 C.C.A.;
*Peck* v. *United States*, 65 F. 2(d) 59, 7 C.C.A.;
*Billingsley* v. *United States*, 16 F. 2(d) 754, 8 C.C.A.

It was particularly harmful and prejudicial to petitioners to deny them the benefit of a bill of particulars as requested in view of the fact that, in truth and in fact, they did not work at the distillery as alleged and the Government would have found it impossible to specify any work done by them and any effort at specification by the Government would have disclosed the weakness of the Government's case and would have rendered the indictment as supplemented by a bill of particulars subject to a motion to dismiss in the nature of a general demurrer. The correctness of this contention will appear from a subsequent portion of this brief wherein we discuss the insufficiency of the evidence and the error of the trial Court in denying motions for judgments of acquittal and the error of the Court of Appeals in affirming the conviction.

(2) The Court erred in permitting the chief Government witness, Investigator Cone, to remain in court throughout the trial over the objection of counsel for petitioners and after petitioners' counsel invoked the rule as to sequestering witnesses.

We respectfully submit that this ruling was particularly harmful to petitioners because of the extreme and pronounced dearth of evidence against these petitioners and because of the Court's permitting this witness not only to

testify in making out the Government's case in chief, but also to resume the stand twice during the trial, the last time after two of the defendants had testified and to rebut their testimony and attempt to supply missing links which, in all probability he could not have done had he not been permitted to remain in the court room and sit through the trial (R. 43-61). On page 65 of the record, this witness, upon being recalled to the stand for the second time after James Matthews had testified that he did not come to the distillery with Stewart, testified that Stewart had stated to this witness that Matthews had picked him up about two miles from the still on the highway and had brought him on down. While this testimony does not constitute evidence against Matthews because the alleged statement was not made in the latter's presence and was made after the defendants had been arrested, it probably had its effect upon the jury. The ruling herein complained of was particularly harmful to petitioners because the Court nowhere charged the jury that they might consider this witness's presence throughout the trial as bearing upon his credibility.

(3) The Court erred in permitting Petitioner Matthews to be impeached by a prior conviction of a whiskey offense more than ten years old (R. 11, 12, 13 and 50).

The rule upon this subject is found in 70 C.J. 854, Section 1057, as follows:

> "Except where lapse of time has been held not to prevent the showing of a previous conviction, it is not permissible to show, for the purpose of impeaching a witness, a conviction of crime which is so remote in point of time that it cannot reasonably bear on his present character. However, whether a conviction is too remote depends on the facts of the particular case, and there is no fixed time at which a previous conviction becomes too remote. Except where, by statute, lapse of time may prevent the showing of a conviction

lapse of time is not the sole determinant; but the lapse of time and the intervening circumstances, such as length of imprisonment following the conviction, the age of the witness at the time of the conviction, and his subsequent conduct, are to be considered, and the conviction held remote or not by the court in the exercise of its discretion. Thus, where there has been a lapse of time, with no intervening convictions, and nothing to show that the witness had not reformed, the conviction may be held too remote; and conversely, where the witness has continued to engage in crime, mere lapse of time does not bar the showing of the conviction."

It will be borne in mind that there is no evidence in the record of any misconduct on the part of Petitioner Matthews between the ten year old conviction and the instant offense and no evidence at all that he had continued to engage in crime in the interim. We have here, therefore, the lapse of more than ten years, with no intervening convictions, and nothing to show that the witness Matthews had not reformed and we respectfully submit that said prior conviction should be held to be too remote.

(4) The Court erred in permitting Petitioner Matthews to be cross examined in the manner complained of and set out in our statement of the case in the petition for certiorari and in the record (R. 48, 49, 50 and 51).

Even assuming that evidence of said prior conviction was admissible for purposes of impeachment, there are only two proper methods of presenting that evidence, one is to produce the record itself and the other is to ask "Have you ever been convicted of a felony", or words to that effect.

In the case of *Meeks* v. *United States*, 163 F. 2(d) 598 (9 C.C.A.), the trial Court stated the rule as follows:

> "There is only one way of asking of the conviction of a crime; by the single and sole question: have you ever been convicted of a crime?"

The appellate court, it is true, reversed that case on the ground that it is error not to permit the introduction of the written record without a preliminary inquiry as to the conviction, but there was no criticism by the appellate court as to the correctness of the trial court's formula for inquiring about the former conviction.

This matter is discussed in 70 C. J. 900, Section 1100, as follows:

> "Of course the question must be so worded as to tend to establish a conviction as distinguished from a mere accusation of charge. A question propounded as to a conviction in the words of the statute permitting such examination is proper, although it is not necessary. The question must not be in such form as to assume the fact of conviction. A general question as to conviction of crime is proper, and it is not necessary to specify a particular crime or conviction."

In the case of *Williams* v. *United States,* (8 C.C.A.); 3 F. 2(d) 129, it is held that a witness may be asked on cross examination for the honest purpose of affecting credibility, whether he has been convicted of a felony, subject to such limitation as the sound discretion of the court may dictate to prevent abuse of the right, and the questioner is bound by the reply, unless the record of conviction is produced to refute the answer of the witness. In the course of the opinion, the Court said:

> "There should be a limitation to the rule hereinbefore announced, and that limitation is that the right to ask a witness on cross-examination the question whether he had been convicted of a felony, is subject to some extent to the regulatory, sound discretion of the court to prevent the abuse thereof. The question may be asked, not for the purpose of honestly discrediting the witness, but really to raise imputations against his character, where there is no foundation whatever therefor, in order to affect the jury, and hence there should

be some discretion in the court to determine whether the question is asked for the purpose of honestly discrediting the witness or whether its purpose is merely to arouse unjust suspicion in the minds of the jurors. The difficulties and annoyances of the witness' chair should not be augmented by unwarranted insinuations or abuse perpetrated by means of cross-examination. There is no difficulty, we think, in a court holding an examination within bounds by the exercise of a sound discretion, and where the question is not asked with the honest purpose of discrediting the witness the court has it within its power in the exercise of such discretion to protect the witness and prevent unfair imputations. Our conclusion in the whole matter is that a witness may be asked on cross-examination, for the honest purpose of affecting credibility, whether he has been convicted of a felony, subject to such limitation as the sound discretion of the court may dictate to prevent abuse of the right; that the questioner is bound by the reply, unless the record of conviction is produced to refute the answer of the witness."

The case of *Hanover Fire Insurance Company* v. *Dallavo*, 274 Fed. 258(6), (6 C.C.A.), holds that the cross-examiner is bound by the negative answer of the witness and cannot impeach or disprove a negative answer by oral testimony. After a negative answer is received, the only resort then is to the record itself.

In the case of *Clainos* v. *United States*, U. S. Circuit Court of Appeals for the District of Columbia, 163 F. 2(d) 593-596, the Court says:

> "Accusations of convictions for crime are serious and a witness's denial should not be contradicted by anything less than a record authenticated by an official directly connected with the Courts——."

The rule is stated in Cyclopedia of Federal Procedure, 2(d) Edition, Section 3132, as follows:

"Where the witness denies the conviction, the cross-examiner is bound by his reply unless the record of the conviction is produced."

We respectfully submit, therefore, that the cross examination of James Matthews, as outlined on pages 48, 49, 50 and 51 of the record was highly improper and extremely prejudicial. We submit that the very form of the questioning itself shows beyond question that the real purpose of the Assistant United States Attorney was not merely to prove the former conviction for the purpose of impeaching the witness, but in the language of the *Williams* case, *supra,* was "to raise imputations against his character, where there is no foundation whatever therefor, in order to affect the jury."

If the sole purpose of the questioning was to prove a former conviction for purposes of impeachment, the question should have been asked in the form approved in the *Meeks* case, *supra,* to-wit: "Have you ever been convicted of a felony?"

The form of the questioning followed by the Assistant United States Attorney had the necessary effect of ridiculing petitioner Matthews. Consider these questions:

"Q. James, do you remember me?"

Can it be said that the purpose of that question was to prove a former conviction merely for the purpose of impeaching the witness?

The answer was: "I don't know sir."

If it could be said that the purpose of the question was to inquire about a former conviction, then, under all the authorities, the Government was *bound by the answer. Williams* v. *United States, supra; Hanover Fire Insurance Company, supra; Clainos* v. *United States, supra.* And the answer was decidedly in the negative. The matter

should have ended there. But the next question of the Assistant United States Attorney was:

"Do you remember me from the *last* time you were in court here, back on December 13th and 14th, 1938? Do you remember that?" (emphasis supplied.)

Petitioner Matthews had made a negative reply, which should have bound the Government unless the Government then wished to produce the written record, but, nevertheless, the Assistant United States Attorney is permitted to cross-examine petitioner further with reference to the "*last* time you were in court here." There had not been any evidence up to that stage of the trial, and there has not been any evidence since that stage of the trial, that petitioner Matthews was ever in court more than the *one* time, to-wit: for the offense for which he was tried on December 13th and 14th, 1938, and yet the Assistant United States Attorney is permitted by the form of the questioning herein complained of to suggest that his appearance in the United States District Court on December 13th and 14th, 1938, was only the most recent appearance and that there had been numerous others. Such is the necessary inference from the interrogation about the "last time."

And to the second question above quoted, petitioner Matthews gave another negative reply, to-wit: "No sir, I remember something about it somewhere, but I don't remember it." That reply should have ended the matter for the second time, but not so. The Assistant United States Attorney continued to cross-examine by asking petitioner Matthews as to some of his former associates, to-wit: co-defendants in said former case, as follows, to-wit:

"Q. You knew Mr. T. D. Wilson at that time, didn't you?

A. T. D. Wilson.

Q. Yes.
A. Yes, sir.
Q. And J. D. Hamil?
A. Yes, sir.
Q. Did you know him?
A. Yes, sir."

At this stage of the trial, Matthews' counsel objected as follows:

> "Your Honor please, I object to this line of questioning as being improper. If he wants to impeach the witness, that is not the proper way to do it."

Thereupon, the Assistant United States Attorney made the following statement in the presence of the jury:

> "I am asking him if he remembers me. *I tried him here eleven years ago.*" (emphasis supplied.)

We take it there can be no serious contention to the effect that this is the proper way to impeach a witness. That statement is even worse than the previous question:

> "Don't you remember me from the *last* time you were in Court here——."

Counsel for petitioner Matthews then stated:

> "I take it that it is utterly immaterial whether he remembers my distinguished friend or not."

and the ruling of the Court was:

> "Well, let's get along with the case."

Thereupon, counsel for petitioner Matthews said:

> "Well, that's my objection. I object to that line of questioning, even if he has any grounds upon which to impeach the witness."

Thereupon, the Assistant United States Attorney stated in the presence of the jury:

> "He said he didn't remember seeing anybody there at this still (at this point we wish to state that we have searched the record carefully and fail to find where petitioner Matthews ever stated 'he didn't remember seeing anybody there at this still'). The mash was hot and ready to go and that wasn't but just last August. Now, if he doesn't remember anything about that, I want to see what kind of memory this man has got."

We respectfully submit that the Assistant United States Attorney was not trying to test Matthews' memory. Nothing had occurred during the trial to indicate that his memory was bad. He had testified positively that no one was with him when he came to the still (R. 45) and that the first time he saw Will S. Stewart that day was when Stewart appealed to the officers to release him after his arrest. (R. 45). He was asked also whether he had seen anyone put his hand in the beer and replied:

> "I didn't see nobody but the one who got the jugs and filled it up full; that the only one." (R. 47).

The obvious meaning of that was that he had not seen anyone put his hand in the beer except the one who got the jugs (R. 47). He had already testified about seeing "that fat fellow. He was standing up against the first barrel and had his foot propped up against it." (R. 45).

The ruling of the Court was:

> "Well, you have got a right to test his memory." (R. 49).

Then the Assistant United States Attorney said:

> "And I want to also offer evidence to impeach him."

We submit that thus far petitioner Matthews had not admitted any prior conviction and had made only negative

replies to remembering the Assistant United States Attorney and that the Government was bound by those replies. But the Court ruled:

> "All right, go ahead now."

Then counsel for petitioner Matthews stated:

> "Well, I move to rule out those preliminary questions about whether he distinctly remembers my distinguished friend. I don't think it has a thing in the world to do with this case."

and the Court ruled:

> "Well, I will overrule that objection." (R. 50).

Perhaps the Federal rule permitting cross-examination of a defendant who chooses to take the stand is a good one, but as was stated in the *Williams* case, *supra*,

> "There should be a limitation to the rule (permitting questioning as to prior convictions) hereinbefore announced, and that limitation is that the right to ask a witness on cross-examination the question whether he had been convicted of a felony, is subject to some extent to the regulatory, sound discretion of the court to prevent the abuse thereof."

Not once in the colloquy above set out did the court rule with Matthews' counsel or indicate that there was the least impropriety in the Assistant United States Attorneys' referring to the "last time" Matthews had been in court, or stating in the presence of the jury: "I tried him here eleven years ago."

We respectfully submit, therefore, that petitioner Matthews did not receive a fair trial and that his cross-examination was improper and highly prejudicial, both because the Government was bound by the initial negative replies and should not have been permitted to pursue the cross-exam-

ination further, and for the further reason that the questions themselves were improper and not in the proper form and were calculated to hold petitioner Matthews up to ridicule and derision before the jury.

> "Innocent men may be indicted and convicted, and guilty men may be acquitted, but both good and bad men are alike entitled to the application of the rules of evidence which courts throughout the ages have found to be for the fair and impartial administration of the law. When these rules, under the stress and strain of a trial, have been violated, it does not cure the injury to reply with the stereotyped argument that it does not appear it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is 'that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless'. *Miller* v. *Territory of Oklahoma* (C.C.A.) 149 F. 330, 339, 9 Ann. Cas. 389; *Coulston* v. *United States* (C.C.A.) 51 F. (2d) 178, 182."

*Singer* v. *United States,* 58 Fed. 2(d) 74, 77.

**The Court of Appeals erred in its finding and holding that "There is abundant evidence in the record which points unerringly to the guilt of each of the appellants except Will Stewart" and in its Holding "The Conviction of Appellants Matthews, Nichols and Radney Is Affirmed."**

Petitioners insist that the evidence is entirely insufficient to support the conviction of any of the three of them upon any of the four counts. The Court of Appeals agreed that the evidence was insufficient as to Will S. Stewart.

Let us discuss briefly the evidence as it relates to each of the petitioners.

Taking the evidence against James Matthews, at its worst, it is as follows: he walked up to a distillery and happened to get there about the same time Will S. Stewart

did. It was so dark that he and Stewart could not have seen each other unless they were "pretty much on top of" each other (R. 23). He did not take Will S. Stewart to the distillery. The testimony of T. U. Cone (R. 65) to the effect that Will S. Stewart stated that James Matthews picked him up about two miles from the still on the highway and brought him down is not evidence against Matthews because Matthews was not present at the time of the making of the statement and, furthermore, the appellants at that time were under arrest and, even if there had been a conspiracy among them, which is not even alleged, any statement made by anyone of them after the conspiracy had terminated would not be admissible against the others. *Hogg* v. *United States*, 53 Fed. 2(d) 967 (5 C.C.A.). According to the Governments' evidence (R. 20), as Matthews neared the old truck, he remarked: "Well, I see this old piece of truck finally did get here all right." Matthews testified that what he said was: "I wonder what they got this old junk in here for" (R. 44, 45). Assuming that Matthews said what the officer said he did, it does not spell complicity on Matthews' part. At most, it was an observation that the truck had arrived. It indicates nothing as to the ownership of the truck or as to the identity of its driver. In this connection, the record is entirely silent as to who owned the truck and shows that it was not registered in the name of anyone. (R. 32). What the Government seemed chiefly to rely upon was Officer Cone's testimony that Matthews put his hand in the beer, stirred it around, took a sip of it, and said: "It's dead ready", "How many more are ready to go?" (R. 20). This is certainly not an order or a command to anyone, but is merely an observation. Certainly this would not be considered "working in" a distillery; nor does it prove ownership, possession, custody or control. Officer Cone testified that Matthews, upon seeing him at the still, said: "Well, I guess we're caught all

right" and "couldn't a darn one of you fellows get away?" and that Matthews expressed a desire to make bond for the other petitioners (R. 20), and officer Robinson testified that Matthews suggested to the negroes that they help the officers destroy the distillery (R. 36).

We respectfully submit that the foregoing conduct on the part of Matthews is entirely consistent with his having gone to this distillery for the sole purpose of purchasing some whisky as he swore he did (R. 44). Certainly, the fact that he arranged bonds for the other defendants does not incriminate Matthews. In the case of *Hogg* v. *United States,* 53 Fed. 2(d) 967 (5 C.C.A.), it was held:

> "The circumstances that Hogg became surety on Johnson's bond is all that there is against him. It is not enough to sustain his conviction. His previous connection with Cutcliff in another district had long since come to an end, and there is not the slightest evidence that it had ever been renewed, or even that there had been an opportunity to renew it. His alleged admission to the prohibition agent was without weight, for there was an utter absence of proof connecting him with the corpus delicti. Apparently he was convicted solely upon his previous record."

In the case of *Girgenti* v. *United States,* 81 Fed. 2(d) 741 (3 C.C.A.), the evidence was much stronger against the appellants than is the evidence in this case and yet the Court there reversed the conviction because of insufficiency of evidence. The Court said:

> "The testimony was to the effect that the appellants were arrested when they drove into the farm where the still was found, and that they had in their possession a hydrometer, old clothes, some sandwiches, and a revolver. The hydrometer was of the type used in testing the specific gravity of liquids heavier than water and particularly mash or alcohol from mash. The possession of this instrument was unexplained. The ap-

pellants testified that they were on their way to solicit orders for a wholesale grocery concern, and that they lost their road and drove up the by-road to the premises in question.

The presence of the appellants at or near the premises where the still was in operation is not sufficient to sustain a conviction on counts charging them with possession of an unregistered still or the manufacture of mash, in the absence of any testimony that they were in charge of, or were doing work in connection with, the still. The possession of old clothes, sandwiches, and a revolver is as consistent with innocence of the offenses charged as with guilt. Graceffo *v.* United States (C.C.A.) 46 F. 2(d) 852, and cases there cited. The unexplained possession of the hydrometer supports an inference that the appellants were concerned with testing liquor in some form, but was not in itself sufficient evidence to warrant the conclusion that they were connected with the operation of the still in question. To mention but a few of the possibilities, the appellants might have been purchasers of liquor, or sold liquor, or even had some connection with a still other than the one described in the indictment. The evidence produced fails to sustain the charges in the indictments. We think the learned trial court erred in refusing to direct verdicts for the appellants."

*Girgenti* v. *United States,* 81 Fed. 2(d) 741 (3 C.C.A.).

In the case of *Graceffo* v. *United States,* 46 Fed. 2(d) 852, 853 (3 C.C.A.), Graceffo with eight other defendants was convicted for manufacturing liquor, possessing property designed and intended for the manufacture of liquor and for maintaining a nuisance. The facts were briefly as follows: about seven o'clock in the morning a number of prohibition agents went to a three-story concrete building from which a strong odor of alcohol emanated. The agents looked through cracks in the building and saw a number of five gallon cans commonly used for transporting alcohol. They

entered the building, and the men, including Graceffo, scattered through the building.

In reversing the judgment of conviction, the Court said:

"There is no doubt that intoxicating liquor was being manufactured and a nuisance maintained on the premises, for in the building the agents found a ten thousand gallon still in full operation, many vats filled with mash in a varying state of fermentation, large quantities of mash, yeast, corn sugar, and many five-gallon cans filled with finished and fully manufactured alcohol. But who was guilty of violating the law is another question.

Of the men on the premises, four, Gallio, Levine, Di Palo, and Burg, were dressed in overalls which were smeared with syrup, sugar, and mash. There is no evidence that Graceffo was dressed in clothes indicating that he worked in the distillery. The only evidence against him was his mere presence on the premises at this particular time. No one ever saw him there before, and no incriminating evidence was found on him or in his possession. In explanation to the officers of how he happened to be there, Graceffo said that he came to Reading the night before and went to the distillery to see one of the other defendants. This testimony stands without contradiction or impeachment.

This evidence is insufficient to sustain the judgment. There must ordinarily be something more than the mere presence of a person at a distillery at a particular time to justify an inference of guilt. Mere suspicion and conjecture are not sufficient. Murphy *v.* United States (C.C.A.) 18 F. (2d) 509, 512. If any substantial evidence existed connecting Graceffo with the operation or ownership of this distillery, it is reasonable to infer that the prohibition agents would have produced it. But none was produced, and we are left to suspicion only.

The evidence establishing the presence of Graceffo at the distillery when the prohibition agents arrived, in connection with his explanation of how he came to be there, is as consistent with innocence as with guilt. It

has been held by a long line of decisions in substance that, unless there is substantial evidence of facts which exclude every other hypothesis than that of guilt, it is the duty of the trial judge to direct the jury to return a verdict for the accused, and, where all the evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment against the accused. (cases cited).

Accordingly, there was insufficient evidence to submit to the jury, and the learned trial judge should have directed a verdict for Graceffo."

*Graceffo* v. *United States,* 46 Fed. 2(d) 852 (3 C.C.A.).

In the case of *United States* v. *De Vito,* 68 Fed. 2(d) 837 (2 C.C.A.), the Court held that evidence which merely raised a suspicion that all men on the premises when officers entered possessed unregistered still there, but which did not distinguish one from another in respect of ownership, was insufficient to sustain conviction for possessing an unregistered still. In the course of the opinion, the Court said:

"The still was there, and it was unregistered. They were there also. In spite of the conflict in the evidence, the jury was justified in finding that Marrone was inside the building when the officers testified. Their presence there with the still in operation was a suspicious circumstance. So was the fact that the addresses they gave did not prove to be correct when investigated. If suspicious circumstances were enough, the evidence would be sufficient to support the conviction. But that is not enough, of course. Graceffo *v.* United States (C.C.A.) 46 F. (2d) 852. Granted that the statute, section 3258 Rev. St. (26 U.S.C.A. § 281), does not make it necessary to show possession, but that custody or control is enough, and that it would be unreasonable to believe that the still would have been in operation with no one having it in custody or control; the evidence is woefully weak in any showing that these appellants or any of them had the custody or control of it. They

might have. Any one of them might have. Davis might have; and so might one or more now unknown. They were unfortunate enough to be inside at the moment the officers entered. Had they been working there and had the custody and control of the still, the appearance of their clothing might, perhaps, have given some indication of it. But the officers could remember only how DeVito was dressed, and his clothing was not the kind a workman at a still would be expected to wear. There was no evidence that the clothing of any of the others indicated that its wearer was working there. Nor that the operation of the still required the services of so many. The burden, of course, was on the government to prove beyond a reasonable doubt that these defendants were guilty as charged in the second count. The proof that all were guilty rises only to the level of suspicion, and, as there is nothing to distinguish one from another in this respect, the guilt of none was proved."

*United States* v. *De Vito,* 68 Fed. 2(d) 837 (2 C.C.A.).

And so we respectfully submit that the presence of Matthews at this distillery is only a suspicious circumstance as are his comments in reference to the age and condition of the old truck and his remarks in reference to the readiness of the beer. These circumstances, together with his arranging bond for the other petitioners, do not rise above the level of suspicion. These circumstances are entirely consistent with his sworn testimony that he went to this distillery for the purpose of purchasing some whiskey (R. 44). As was said by the appellate courts in the cases above cited, even if we should assume that Matthews, or these other petitioners, had any illicit connection with this distillery, is there any evidence to show the same beyond a reasonable doubt, or does the evidence exclude every other reasonable hypothesis?

It is expressly recognized in the *Girgenti* case, *supra*, that if a person visited a distillery for the purpose of purchasing whiskey, he is not guilty of the offenses charged in this indictment.

Let us consider next the evidence as it relates to John Henry Nichols and John Henry Radney. It is only a surmise on the part of the officers that the two men who drove the old truck to a point 30 or 40 paces from the still and who then went down to the distillery were Nichols and Radney. The officers could not see and did not know who the two men were (R. 18, 24). The two men who drove the old Ford truck left it and walked on down the still path (R. 18) and shortly thereafter the oil burner at the still was lighted (R. 18), but the officers testified that they did not know who fired the distillery (R. 18, 36). It is true that later, while it was still dark, Nichols and Radney came up to the truck from the direction of the still and were arrested (R. 18, 34). Nichols did not attempt to run, because he walked right into Robinson's hands (R. 34), it being very dark (R. 23). Radney did attempt to run (R. 34), but mere presence and flight are not sufficient to sustain a conviction. In the *Graceffo* case, *supra*, the defendants were present at the distillery and "scattered through the building". It is a mere guess that Nichols and Radney are the men who lighted the burner at the distillery 30 or 40 paces away from where they were arrested in the black darkness. Furthermore, if either of them lighted the distillery, which one did it? There the Government would have to indulge in the wildest speculation. As was said in the *De Vito* case, *supra*, "The proof that all were guilty rises only to the level of suspicion, and, as there is nothing to distinguish one from another in this respect, the guilt of none was proved."

There is no other evidence against Nichols or Radney.

The case of *Partson* v. *United States* (8 C.C.A.), 20 Fed. 2(d) 127, holds that a man caught near a distillery with working clothes on and a monkey wrench in his hand fixing a pipe near the still cannot be convicted of violating Sec. 6021, Compiled Statutes, 3281, Revised Statutes 26, (26 U.S.C.A. 2833, under which counts 2 and 3 of this indictment are drawn), the purpose of which is to prevent a distiller from defrauding the Government out of the tax upon the product which he manufactures where the evidence indicates that the defendant had no interest in the distillery other than as an employee working there. The Court said:

> "There was no evidence that the defendant had any financial interest in any of the real or personal property in or on the Clausen farm, except his clothes, or in the business thereof, except his interest in his hourly wages."

*Partson* v. *United States* (8 C.C.A.), 20 Fed. 2(d) 127.

**Conclusion**

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that petitioners may have the benefit of an adjudication upon specifications of error properly made by them and in order that the decisions of the different Circuits might be harmonized with respect to the allowance of bills of particulars and with respect to the sufficiency of evidence in circumstantial cases and in order that petitioner Matthews might receive a fair trial free from prejudicial and improper cross examination by Government counsel and that, to such an end, a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the Fifth Circuit and finally

reverse it insofar as it affirmed the conviction of these three petitioners.

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# In the Supreme Court of the United States

OCTOBER TERM, 1949

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No. 496

JAMES MATTHEWS, JOHN HENRY NICHOLS, AND JOHN HENRY RADNEY, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Appeals (R. 113-114) is reported at 177 F. 2d 278.

### JURISDICTION

The judgment of the Court of Appeals was entered October 28, 1949 (R. 115), and a petition for a rehearing (R. 116-120) was denied November 25, 1949 (R. 121). The petition for a writ of certiorari was filed December 23, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to order a bill of particulars setting forth the specific acts of petitioners constituting "working in a distillery."

2. Whether the trial court erred in permitting a government agent-witness to remain in court throughout the trial after petitioners invoked the rule as to sequestration of the witnesses.

3. Whether the trial court erred in permitting the prosecution to show on cross-examination of petitioner Matthews that he had been convicted ten years previously of a similar offense.

4. Whether the evidence is sufficient to support petitioners' convictions.

STATUTES INVOLVED

26 U. S. C. 2810:

> Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is * * *.
>
> * * * * *
>
> And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years.

26 U. S. C. 2831:

Every person engaged in distilling * * * spirits * * * shall place and keep conspicuously on the outside of the place of such business a sign * * * with the words: "Registered distillery" * * *.

* * * And every person who works in any distillery * * * on which no sign is placed and kept, as hereinbefore provided, * * * shall be fined not less than $100 nor more than $1,000, or be imprisoned not less than one month nor more than six months.

26 U. S. C. 2833:

Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * *

STATEMENT

Petitioners Matthews, Nichols, and Radney, together with one Stewart, were convicted (R. 78) on an indictment in four counts charging possession of an unregistered still (count 1, 26 U. S. C. 2810), carrying on the business of distillers without having given bond (count 2) and with intent to defraud the United States of taxes (count 3, 26 U. S. C. 2833), and working in an unregistered distillery (count 4, 26 U. S. C. 2831) (R. 2-3). The

Court of Appeals affirmed petitioners' convictions, but reversed Stewart's because it found the evidence against him insufficient (R. 113-114).

The evidence for the prosecution showed that on the evening of August 27, 1948, Cone, an investigator for the Alcohol Tax Unit, and three Georgia revenue agents—Brooks, Smith, and Robinson—observed a moonshine distillery with two 220-gallon stills fired by an oil burner, in Butts County, Georgia. Nobody was around at the time, but the still was set up for operation and the agents saw about 3,000 gallons of beer mash in barrels ready for distillation. (R. 15-17.) They remained near the still all night and at about 4:25 the next morning, August 28, they saw two men drive an old truck across a plowed field to within 30 or 40 steps of the wooded area where the still was located (R. 18). On the truck, which bore no license plates (R. 31), there were 90 cases of gallon jugs and four 50-gallon oil drums (R. 21). A few minutes after the two men walked to the still, the oil burner was lit (R. 18), but because of the darkness the officers could not see who started the burner (R. 23, 36). While Robinson was examining the truck the two men, petitioners Nichols and Radney, returned to it. Robinson arrested Nichols. Radney tried to get away but Brooks caught and arrested him. (R. 18-19, 34.) After Smith took Nichols and Radney to the still (R. 19), the other officers saw petitioner Matthews and Stewart, the latter

carrying a box of groceries, walking across the cultivated field in the direction of the still (R. 19, 25, 26, 63). The officers hid in some bushes and heard Matthews remark, as he approached the truck, "Well, I see this old piece of truck finally did get here all right" (R. 20, 26, 28, 35). Matthews then walked to the still. After stirring his hand in one of the barrels of mash and taking a sip of it, he said, "It's dead ready," and asked, "How many more are ready to go" (R. 20, 28, 40). When Matthews saw officer Smith leaning against one of the barrels and inquired as to who he was, Smith asked Matthews the same question. Cone then came out of hiding and told Smith that the man was Matthews. Recognizing Cone as an officer, Matthews said, "Well, I guess we're caught all right" (R. 20, 29), and added, "couldn't a darn one of you fellows get away" (R. 20, 36). Meanwhile, Robinson arrested Stewart, who was behind Matthews as he approached the still (R. 35). Several days later, Matthews made bond for Nichols, Radney, Stewart, and himself (R. 21-22).

Matthews' version was that a Negro, whose name and address he did not know, had told him about the still (R. 52); that four days later, after parking his truck on the highway, he walked about a quarter of a mile across a cultivated field in the early morning darkness and found the still without any trouble (R. 55, 60); that he was going to the still to buy some keg whiskey, as he told the

officers, but did not know whose still it was and did not have enough money to buy the liquor that morning (R. 47, 59); and that he was not afraid of being shot at near a strange still early in the morning (R. 56, 60). In contradicting prosecution evidence, Matthews denied that Stewart had gone with him to the still (R. 45, 46, 55); denied that he ran his hand through the beer and that anyone said, "It's dead ready" (R. 46, 47-48); and stated that he said in regard to the truck, "I wonder what they got this old junk in here for" (R. 44-45). In rebuttal, Cone testified that Matthews did not tell the officers he came to the still to buy liquor (R. 62), and that Stewart had said that Matthews picked him up in his truck and took him to the still on the day of the raid (R. 65).

ARGUMENT

1. There is no merit in petitioners' contention (Pet. 22-23) that the trial court abused its discretion in denying their motion for a bill of particulars (R. 4-5), which was not filed until the day of the trial (R. 4, 6), in so far as they sought particulars as to the acts of each defendant which the prosecution contended constituted working in the distillery. In apologizing for the delay, their counsel stated: "Your Honor please, we apologize for not making this motion for a bill of particulars at an earlier date, but some time it is just hard to get around to doing what needs to be done prior to

the trial" (R. 7).[1] Obligingly, the government attorney orally supplied the information requested as to the time and place of the offenses alleged in the indictment, but as to the particular acts which constituted "working in a distillery," under count 4, the trial court ruled, "that would be a matter of evidence" (R. 9-10).

The application for a bill of particulars was addressed to the sound discretion of the court. Clearly, there was no abuse of discretion in denying the request for particulars as to what "each one of these four defendants did" (R. 10). For as the prosecutor pointed out in opposing this request, it called for evidence of the acts of each defendant (*ibid.*). And, of course, as the trial judge ruled, that is not the function of a bill of particulars. It is equally clear that there was no prejudice to petitioners in defending against the charges, especially in view of the particulars voluntarily supplied by the prosecutor. The argument here to the contrary is frivolous. At the time the court denied the request as calling for evidence, petitioners' counsel replied, "All right, sir, we just did not want to waive that ground of our motion" (R. 10).

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[1] Petitioners had not previously been arraigned on the indictment. Technically, their motion for a bill of particulars was therefore not untimely under Rule 7(f), F.R. Crim. P., which provides that such a motion "may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order."

2. Also clearly without substance is petitioners' complaint (Pet. 23-24), with no supporting authorities cited, that the trial court erred in permitting the government witness Cone to remain in court throughout the trial after petitioners' counsel had invoked the rule as to sequestration of the witnesses (R. 13-14). Sequestration of the witnesses is discretionary with the trial court, and its ruling will not be disturbed in the absence of manifest prejudice.[2] There was no prejudice to petitioner by reason of Cone's remaining in court during the trial, because he could have been used as a rebuttal witness to supply the same evidence even if he had been excluded from hearing the other testimony. It is doubtful whether it would have been proper to charge the jury, as petitioners now suggest should have been done (Pet. 24), although there was no such request at the trial, that they might consider Cone's presence throughout the trial as bearing upon his credibility. Cone's mere presence would have no logical tendency to render his testimony unreliable.

3. Petitioners also urge that the trial court erred in permitting the prosecution to show, in cross-examining petitioner Matthews, that he had been convicted in the same court ten years previously on a liquor charge (R. 51) because the conviction

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[2] *Kaufman* v. *United States*, 163 F. 2d 404, 408 (C.A. 6), certiorari denied, 333 U.S. 857; *Mitchell* v. *United States*, 126 F. 2d 550, 553 (C.A. 10), certiorari denied, 316 U.S. 702.

was too remote to have any bearing on his credibility (Pet. 24-25). The prior conviction was not introduced to put Matthews' character in issue, as defense counsel contended (R. 50), but for the sole purpose of impeachment, the trial court explicitly instructing the jury to that effect (R. 51). Whether the conviction was so remote as to have no probative value was a question addressed to the sound discretion of the trial court. Since the prior conviction was for a similar offense and, as the court pointed out, its weight as affecting Matthews' credibility was for the jury to determine (R. 50), there was no abuse of discretion in admitting the evidence for the limited purpose for which it was offered.[3]

In this connection, petitioners also argue (Pet. 25-33) that the trial court erred in permitting the prosecutor to question Matthews, before bringing out the fact of the prior conviction, as to whether he remembered the prosecutor and other persons who figured in that case in 1938. Defense counsel objected that this was not the proper way to introduce the conviction for impeachment purposes. But the prosecutor pointed out that he was also testing Matthews' memory, since he had testified that he did not remember seeing anybody around the still at the time of the arrests or that the mash

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[3] See *Claunch* v. *United States*, 155 F. 2d 261, 263 (C.A. 5) (1933 conviction admissible in a case decided by the Court of Appeals in 1946); *Goddard* v. *United States*, 131 F. 2d 220 (C.A. 5) (12-year old conviction admissible).

was "hot and ready to go." This was proper cross-examination, for, as the court said in overruling the objection, the prosecutor had "a right to test his memory." (R. 49.) Neither is there any merit in petitioners' further contention that Matthews' negative and equivocal answers to the prosecutor's preliminary questions constituted a denial of the prior conviction and thus foreclosed further questioning concerning it. Obviously, Matthews did not deny in his answers to these questions that he had been convicted in 1938. He only denied that he remembered the prosecutor. When he was asked a moment later whether he had been convicted in the same court in 1938 of conspiracy to violate the federal liquor revenue laws, he readily admitted that fact.

4. Finally, petitioners assert that the evidence is insufficient to support the jury's verdict (Pet. 33-41). But both courts below upheld the sufficiency of the evidence as to petitioners, the Court of Appeals remarking that "There is abundant evidence in the record which points unerringly to the guilt of each" of them (R. 114). Our summary of the evidence in the Statement, *supra,* pp. 4-6, amply supports this conclusion. In view of the holdings below, we submit that there is no occasion for further review of this question by this Court. See *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589-590.

## CONCLUSION

There is no conflict of decisions, and no questions are presented meriting further consideration by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 873489 461